No. 12846

United States
COURT OF APPEALS
for the Ninth Circuit

CHARLES D. BRONSON, JR.,
Appellant,

v.

HUGH EARLE, Collector of Internal Revenue for the District of Oregon and United States of America,
Appellees.

On Appeal from the United States District Court for the District of Oregon.

BRIEF FOR THE APPELLEES

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BRIEF FOR THE APPELLEES

OPINION BELOW

The pretrial order of July 11, 1950 (R. 3-9), the oral opinion of the District Court of August 4, 1950 (R. 21), and the findings of fact and conclusions of law of November 17, 1950 (R. 10-17), are not reported.

JURISDICTION

This appeal involves a deficiency in federal income taxes of Charles D. Bronson, Jr., hereinafter referred to as taxpayer, for 1944, 1945, and 1946 in the respective amounts of $9,678.23, $10,488.93 and $23,339.51 plus interest. (R. 5.) The deficiencies resulted from the Commissioner's determination that amounts received from two alleged partnerships reported in the income tax returns of taxpayer's wife should be taxed to him. The deficiency was satisfied in part by applying credits resulting from an overassessment of income of taxpayer's wife (R. 5-6) and in part by payments to the Collector and to the former Collector of Internal Revenue for the District of Oregon. (R. 3-4.) Taxpayer filed a claim for refund on May 10, 1949, which was disallowed by the Commissioner of Internal Revenue on December 19, 1949. (R. 6.) Within the time provided in Section 3772 of the Internal Revenue Code and on March 6, 1950, taxpayer filed a complaint in the District Court for the District of Oregon for the recovery of the taxes paid. (R. 20.) Jurisdiction was conferred on the District Court by 28 U. S. C., Sections 1340 and 1346 (a)(1). Judgment was entered in favor of the United States and of the Collector on November 17, 1950. (R. 18-19.) Within sixty days and on January 12, 1951, notice of appeal was filed. (R. 19.) Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

QUESTIONS PRESENTED

1. Where taxpayer's wife contributed no services, capital or other benefits to the partnership of which taxpayer was copartner and no facts indicated an intent that she be made a genuine partner for business reasons, did the District Court err in finding that taxpayer and his wife were not bona fide partners for federal income tax purposes?

2. Where taxpayer's wife entered into a partnership with a customer of the company in which taxpayer was co-owner and operator for the sole purpose of permitting taxpayer to avoid OPA Regulations and to receive more than the ceiling price for products sold and where she contributed no capital or services to the partnership, did the District Court err in concluding that the income she received represented income of the taxpayer assigned by him to his wife and taxable to him?

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 11. NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a * * * a tax * * *.

(26 U.S.C. 1946 ed., Sec. 11.)

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service

* * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

(26 U.S.C. 1946 ed., Sec. 181.)

SEC. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

* * * * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183 (b).

(26 U.S.C. 1946 ed., Sec. 182.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.22(a)-1. *What included in gross income.* —Gross income includes in general compensation for personal services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits and income derived from any source whatever, unless exempt from tax by law. (See sections 22(b) and 116.) In general, income is the gain derived from capital, from labor, or from both combined, * * *.

* * * * *

STATEMENT

The material facts as disclosed in the undisputed testimony and as found by the District Court may be summarized as follows:

Taxpayer was married in 1933. (R. 24.) In 1935 he went to Warrenton, Oregon, and constructed a shingle mill operated by the Warrenton Shingle Company, the stock for this company being subscribed by taxpayer, his father, and Richard C. Roles. (R. 25-26.) Taxpayer's wife joined him there three or four months later. (R. 30.) The stock interests of taxpayer and of Roles in the Warrenton Company are identical. (R. 28.) The money to purchase taxpayer's stock interest came from a bank account he and his father had together and a small amount from the operation of a service station taxpayer had operated prior to moving to Warrenton. (R. 27.) The Warrenton Company purchased a mill at Toledo which was operated by Roles. After the Warrenton mill burned down the Warrenton Company purchased a sawmill at Parkdale for a total amount of $45,000 and the Parkdale Lumber Company was set up as a limited partnership in the first part of 1944. (R. 40-42, 94.) Of the purchase money for Parkdale $20,000 was paid from the Warrenton Shingle Company account and from the Bronson Log account before the saw mill was taken over in 1944 and the balance was paid from profits received from the saw mill. (R. 40, 96, 97, Exs. 16, 17.)

The District Court found that taxpayer's wife contributed no capital directly or indirectly through any community property interest or otherwise, that she made no substantial contribution of services and did not in any substantial manner influence the conduct of the business or exercise any voice or control of the distribution of the income from the Parkdale Lumber Company. It found that taxpayer and Roles actually controlled and dominated the business of the Parkdale Lumber Company and that taxpayer, through his contribution of capital and through his management of the Parkdale Lumber Company, actually created the right to receive and enjoy all of the income therefrom taxed to taxpayer amounting to one-half of the income and actually received or controlled and treated as his own this income. The partnership known as the Parkdale Lumber Company made no substantial change in the economic relation of taxpayer and his wife since he continued to earn and produce the income taxed to him and controlled its use and disposition (R. 10-11.)

Taxpayer and his wife did not intend in good faith and with a business purpose to join together as partners in the conduct of the business of the Parkdale Lumber Company. Taxpayer's wife was not brought into the business as a partner for genuine business purposes but principally for the purpose of minimizing taxpayer's income taxes. (R. 11-12.)

Morgan Stark, one of the partners of the Beverly Roofing Company in California, was unsuccessful in trying to purchase shingles from the Warrenton Shingle

Company, because of prior commitments to others in the Los Angeles area. Stark proposed to take taxpayer and Roles into partnership with him so that they might share in the profits of the sale of shingles by Beverly. Inasmuch as the Warrenton Shingle Company was at that time selling its entire output at the ceiling price under OPA Regulations, taxpayer and Roles advised Stark that they could not accept a higher price. After Beverly had purchased the business of Ashbaugh, one of the customers of Warrenton in Los Angeles, the Ashbaugh Shingles and Shakes arrangement was entered into on or about August 3, 1945, between the Beverly Roofing Company, taxpayer's wife and the wife of R. C. Roles. Under the terms of the agreement Beverly managed and operated the partnership, furnished its capital and neither taxpayer's wife nor Mrs. Roles was to assume personal liability from its operations. The two women received 65 per cent of the profits for 1945 and 1946 and 50 per cent thereafter. Ashbaugh was organized to permit taxpayer and Roles to avoid OPA Regulations fixing the ceiling price for shingles sold by Warrenton to Beverly. The wives were made nominal partners because it would have been obviously illegal for taxpayer and Roles to become partners. Taxpayer was the real beneficiary of the arrangement and taxpayer, not his wife, had dominion and control over the income allocated to her. This arrangement was merely an assignment of income by the taxpayer to his wife. Taxpayer's wife made no contribution of capital or services to the Ashbaugh partnership nor did she contribute to the production of its income. The amounts she received

from Ashbaugh were paid to her solely because the Warrenton Shingle Company, owned and operated by taxpayer and Roles, was, under the circumstances, willing to and did ship a substantial part of its output of shingles to the Beverly Roofing Company. (R. 12-14.)

SUMMARY OF ARGUMENT

Taxpayer's wife was not a bona fide partner in the Parkdale Lumber Company for federal income tax purposes. None of the capital which went into the Parkdale mill originated with her directly or indirectly. This money came partially from earnings of her husband prior to their marriage, partially from his subsequent earnings in the Warrenton Shingle Company in which she had no interest, and partially out of the profits from the Parkdale mill to which she contributed nothing. There is no evidence of a gift by taxpayer to his wife either of an interest in the Parkdale mill or of property used to acquire it. Taxpayer's wife contributed no services either in connection with the Warrenton Shingle Company or the Parkdale mill other than to answer the telephone in her own home and to participate in family discussions. Moreover, she was not qualified to take an active part in the business. No business purpose was served in making taxpayer's wife a partner. Instead, she was brought into the business principally for the purpose of minimizing taxpayer's income taxes. The fact that one purpose in making her a general partner was to enable taxpayer to avoid personal liability in a hazardous enterprise and to prevent a deficiency judg-

ment against his assets does not supply the necessary business purpose for a bona fide partnership. Since the wife had no assets her general liability gave no stability to the business. Taxpayer at all times had control over the business and over the income from it and his wife did not substantially influence the conduct of the business or exercise any voice or control in the distribution of income.

Taxpayer's wife was not a bona fide partner in the Ashbaugh Wood Shingles and Shakes Company for federal income tax purposes. She became a partner in this enterprise of a customer of the Warrenton Company of which taxpayer was co-owner, along with the wife of the other co-owner for the purpose of avoiding OPA Regulations to enable taxpayer to receive more than the ceiling price for shingles when it would have been obviously illegal for him to have become a partner. She contributed no capital or services to the partnership. The arrangement did not manifest an intent in good faith and with a business purpose to join together as partners in the conduct of a business. Although taxpayer was not made a partner, he was the real beneficiary of the arrangement, and his efforts contributed to the income produced by it. The money she received was merely income of the taxpayer assigned by him to his wife, and such amounts were properly taxable to him.

ARGUMENT

I.

The Record Fully Supports the Determination of the District Court That Taxpayer's Wife Was Not a Bona Fide Partner in the Parkdale Lumber Company for Federal Income Tax Purposes.

Under the provisions of Sections 181 and 182 of the Internal Revenue Code, *supra,* partnerships are not taxable as such for federal income tax purposes but the individual members are taxable upon their distributive share of the partnership income. However, the provisions of the income tax statute apply only to bona fide partnerships which have a genuine business purpose. *Commissioner v. Culbertson,* 337 U.S. 733. Moreover the validity of a partnership arrangement under state law is not necessarily controlling for federal tax law purposes. *Commissioner v. Tower,* 327 U.S. 280; *Anderson v. Commissioner,* 164 F. 2d 870 (C. A. 7th), certiorari denied, 334 U.S. 819.

The first question presented here is whether taxpayer's wife was a partner in the Parkdale Lumber Company during the taxable years involved. The material evidentiary facts are not in dispute.

A. *Taxpayer's wife contributed no capital.*

The record shows conclusively that taxpayer's wife contributed nothing directly or indirectly to the purchase of the Parkdale mill and that the funds used for this purchase came from other sources. She testified that

at the time of her marriage in 1933 she had only $100. (R. 137.) At that time taxpayer had approximately $10,000. (R. 88.) He operated a service station and put his personal earnings into a bank account with his father. In 1935 taxpayer, his father and R. C. Roles formed the Warrenton Shingle Company for the operation of a shingle mill at Warrenton, Oregon. (R. 25.) Taxpayer's wife was not a stockholder and she put no money into the Warrenton business. (R. 93.) In 1944, after the mill at Warrenton burned, taxpayer and Roles bought the Parkdale mill, title to which was taken in the name of the Warrenton Shingle Company. (R. 39-41, 109.) The money for the Parkdale purchase came partly from the Warrenton Shingle Company, partly from funds in taxpayer's log account made up of his earnings from the Warrenton mill, and the remainder out of profits from the operation of Parkdale. (R. 96-97.)

The Parkdale partnership was set up as a limited partnership with taxpayer's wife and R. C. Roles designated general partners, the taxpayer and Mrs. Roles being designated limited partners. The agreement provided that taxpayer and Mrs. Roles were each to contribute $2,500 in money and nothing in property. It was silent as to any contribution on the part of taxpayer's wife. (Exs. 25, 26.)

There is nothing in the record from which a gift from taxpayer to his wife of an interest in Parkdale can be inferred nor did taxpayer claim he had made a gift to his wife. The vague references in the testimony of Mr. Martin with respect to a gift tax return are in no way

related in the record to a purported gift to taxpayer's wife. (R. 55-56.) The fact that a down payment of $10,000 was made (R. 96) and that four persons signed the partnership agreement can in no way be taken to mean that each was expected to contribute $2,500 or that in some unexplained manner the taxpayer had made a gift to his wife of such amount. The theory of a gift was advanced as an inference for the first time in the taxpayer's brief on appeal. (P. 27.) It is not up to this Court to make suppositions and to supply missing facts not in the record. There is nothing in the record to indicate that taxpayer at any time divested himself of dominion and control over any property interest in Parkdale or in property that went into the purchase of Parkdale so as to constitute a valid gift to his wife.

Thus none of the money that went into the Parkdale mill originated with taxpayer's wife directly or indirectly. She had no interest in the funds that came from the Warrenton Company; she had contributed nothing to the bank account taxpayer maintained with his father; and likewise it is clear she had no part in the production of income from the Parkdale business from which the remainder of the funds were taken.

B. *Taxpayer's wife contributed no services.*

The partnership agreement did not specify who was to operate the business. (Exs. 25, 26.) The evidence is clear, however, that taxpayer operated the Parkdale mill (R. 97, 127) and that his wife did no physical work or bookkeeping in connection with it. She had three young

children to care for. She had never worked since her marriage and she had never participated in the operations of the mill at Warrenton. The only services the record shows she performed in connection with the operations at Parkdale were negligible, such as answering the telephone. There is nothing to indicate she would have been qualified to act as a true partner. On the contrary, she appeared totally unfamiliar with business operations in general and with details of the lumber and shingle business. There is nothing to indicate that taxpayer's wife influenced the conduct of the business or exercised any voice or control in its operations even through discussions with her husband. (R. 135-138.)

It is believed that taxpayer places too much emphasis on the fact that he and his wife discussed business matters. (Br. 20-21.) If discussions between husband and wife could be taken to be participation in management and control of a business the wife of practically every businessman could lay claim to a partnership status for tax purposes.

The suggestion appears in taxpayer's brief (pp. 30, 46) that perhaps the most significant contribution taxpayer's wife made was that she provided the necessary stability to the partnership. It is difficult to conceive how the partnership could acquire any stability through making taxpayer's wife a general partner subject to full personal liability when she had no money or property of her own apart from that of her husband. Subjecting herself to such liability could in no way add stability to the partnership as taxpayer contends. She had no

property which might have benefited the business by its availability for use as security by the partnership or for paying off any partnership losses. Her only resource appears to have been the right to draw on the taxpayer's bank account. Therefore, the contention in taxpayer's brief (p. 46) that her general liability would provide stability in a hazardous occupation is of no significance.

This is a situation where careful scrutiny of the transaction between members of the family indicates an attempt to shift the tax incidence by a mere surface change in ownership without disturbing the dominion and control of the taxpayer over the property. It is a mere camouflage. *Commissioner v. Culbertson,* 337 U.S. 733, 746-747. The arrangement was without substance and amounted only to an attempted allocation of one-half of taxpayer's income to his wife. An assignment of income flowing from the personal skill and services of the taxpayer is ineffective for tax purposes. The court below was correct in finding that all of such income should be taxed to the taxpayer. *Commissioner v. Tower,* 327 U.S. 280; *Burnet v. Leininger,* 285 U.S. 136; *Lucas v. Earl,* 281 U.S. 111; *Wilson v. Commissioner,* 161 F. 2d 556 (C. A. 4th), certiorari denied, 332 U.S. 769; *Grant v. Commissioner,* 150 F. 2d 915 (C. A. 10th); *Earp v. Jones,* 131 F. 2d 292 (C. A. 10th), certiorari denied, 318 U.S. 764.

Cases from other circuits on which taxpayer relies are all distinguishable on their facts. For example, in the case of *Cooke v. Glenn,* 78 F. Supp. 519 (W. D. Ky.), affirmed, 177 F. 2d 201 (C. A. 6th), the court

found that part of the working capital of the business was definitely traceable to taxpayer's wife. The cases of *Funai v. Commissioner,* 181 F. 2d 890 (C. A. 4th); *John L. Denning & Co. v. Commissioner,* 180 F. 2d 288 (C. A. 10th), and *Vaughan v. Carey,* 88 F. Supp. 967 (N. D. Ohio), are likewise distinguishable inasmuch as in these cases the courts found that taxpayer's wife contributed both capital and services to the partnership.

C. *The Partnership served no business purpose.*

There was no business purpose shown for including taxpayer's wife in the partnership. The business was admittedly set up as a limited partnership in order to protect taxpayer from any personal liability which might result from the operation of such a hazardous business, to prevent a deficiency judgment against assets he had invested in apartment houses with his two brothers and his father. (R. 42, 54, 106.) Such a purpose cannot be regarded as a bona fide business purpose from the standpoint of the federal tax law. The situation is analogous to that in *Quon v. Commissioner,* 165 F. 2d 215 (C. A. 9th), certiorari denied, 334 U.S. 845, where this Court affirmed the Tax Court's decision of March 28, 1947 (1947 P-H T. C. Memorandum Decisions, par. 47,077), that the formation of a partnership to avoid the freezing of assets does not serve to supply a business purpose in an attempted partnership for income tax purposes. As the Tax Court said there "it is not the kind of business purpose, in our judgment, which is indicative of the essential intent to really and truly join

together for the purpose of carrying on business as partners."

The case of *Twin Oaks Co. v. Commissioner,* 183 F. 2d 385 (C. A. 9th), is clearly distinguishable from the instant case since in that case this Court found complete good faith in the formation of the partnership with no thought or intent to achieve tax avoidance. Moreover, all members of the partnership there were subject to unlimited personal liability. There was no subterfuge involved as there obviously is in the instant case.

As the Supreme Court stated in *Commissioner v. Culbertson,* 337 U.S. 733, 742, the question in each partnership case is whether, considering all the facts, "the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise."

The case of *Nordling v. Commissioner,* 166 F. 2d 703 (C. A. 9th), certiorari denied, 335 U.S. 817, involves many of the same factors that are present in the instant case. The wife had no separate property and furnished no capital or services to the business. Her credit was not relied on in financing. This Court held there was no manifest intention that she have a real ownership of a partnership interest and concluded that she was only a nominal partner. It stated (p. 704): "In tax matters the realities of a transaction, not artificialities, are given effect." See also *Bloomfield Ranch v. Commissioner,* 167 F. 2d 586 (C. A. 9th), certiorari denied, 335 U.S. 820.

The formal execution of articles of partnership is not conclusive of the existence of a partnership for federal tax purposes in the absence of an intent to carry on business as true partners. As the Supreme Court said in *Commissioner v. Tower,* 327 U.S. 280, 291, "By the simple expedient of drawing up papers, single tax earnings cannot be divided into two tax units and surtaxes cannot be thus avoided."

The arrangement here was completely lacking in substance and the evidence disclosed no intent that the wife have a real ownership of the partnership interest. The self-serving statement of taxpayer's co-partner Mr. Roles that the "agreement was that we would all go in as partners and divide this Parkdale up equally between all" (R. 123), is not at all conclusive as to the parties' intent to make taxpayer's wife a partner. The record supports the court's finding (R. 12) that she was brought into the enterprise not as a partner for a genuine business purpose but rather principally for the purpose of minimizing taxpayer's income taxes. (R. 46.) The Court must look at the actualities of the transaction by which taxpayer seeks to avoid taxes and if it finds there is a subterfuge the arrangement may be disregarded for tax purposes. *Yiannias v. Commissioner,* 180 F. 2d 115 (C. A. 8th). Transactions must not be mere tax dodging devices without substance or business benefits. *Helvering v. Clifford,* 309 U.S. 331; *Griffiths v. Commissioner,* 308 U.S. 355; *Higgins v. Smith,* 308 U.S. 473; *Gregory v. Helvering,* 293 U.S. 465.

The amounts distributed to taxpayer and his wife from the Parkdale operations all went into the same joint account. (R. 100.) Taxpayer contributed the capital (R. 96-97) and received, controlled, and treated as his own all of the income from Parkdale. (R. 10, 101-104.) It was taxpayer and not his wife who created the right to receive and enjoy all of the income.

In reiterating the principles enunciated by it in the *Tower* case, *supra,* the Supreme Court in *Commissioner v. Culbertson,* 337 U.S. 733, 739-740, stated:

> In the *Tower* case we held that despite the claimed partnership, the evidence fully justified the Tax Court's holding that the husband, through his ownership of the capital and his management of the business, actually created the right to receive and enjoy the benefit of the income and was thus taxable upon that entire income under §§ 11 and 22(a). In such case, other members of the partnership cannot be considered "Individuals carrying on business in partnership" and thus "liable for income tax . . . in their individual capacity" within the meaning of § 181. If it is conceded that some of the partners contributed neither capital nor services to the partnership during the tax years in question, as the Court of Appeals was apparently willing to do in the present case, it can hardly be contended that they are in any way responsible for the production of income during those years. The partnership sections of the Code are, of course, geared to the sections relating to taxation of individual income, since no tax is imposed upon partnership income as such. To hold that "Individuals carrying on business in partnership" include persons who contribute nothing during the tax period would violate the first principle of income taxation: that income must be taxed to him who earns it.

As the District Court found, from all the facts and circumstances throwing light on or tending to show the true intent of the parties to the agreement, taxpayer and his wife did not intend, in good faith and with a business purpose, to join together as partners in the conduct of the Parkdale enterprise. (R. 11-12.) We submit that the District Court applied the correct principles and that its conclusion is fully supported by the record.

II.

The Record Fully Supports the Determination of the District Court That the Arrangement by Which Taxpayer's Wife Received Income from Ashbaugh Wood Shingles and Shakes Was Merely an Assignment of Income by Taxpayer Who Was the Real Beneficiary.

The District Court concluded that the amounts of money paid during the taxable years involved to taxpayer's wife by the Ashbaugh Wood Shingles and Shakes Company represented income of the taxpayer assigned by him to his wife and that such amounts were properly taxed to the taxpayer. (R. 15.) This conclusion is fully supported by the facts in the record disclosing the manner in which the Ashbaugh Company was set up and operated.

Prior to the formation of the Ashbaugh Company in August, 1945, Morgan Stark of the Beverly Roofing Company in Los Angeles had negotiated with Mr. Roles in an attempt to buy shingles from the Warrenton Company. (R. 128.) It was difficult to get shingles at that

time on account of existing shortages and black market operations. (Ex. 129, p. 7.) When Stark was unsuccessful in obtaining shingles from Warrenton because of prior commitments to customers in the Los Angeles area, one of which was Ashbaugh, Stark raised the question whether he could get shingles from Warrenton if he bought out Ashbaugh but again received no satisfactory answer. (Ex. 129, pp. 11-13.) Stark then proposed to take taxpayer and Roles into a partnership so that they might share the profits from the sale of shingles by the Beverly Roofing Company but they advised him they could not accept a higher price than the ceiling price set under Regulations of the Office of Price Administration. Taxpayer was evasive in his testimony with respect to this offer but testified that he and Roles told Stark they could not take money under the table at more than OPA prices. (R. 13, 83.)

After making tentative arrangements to buy out Ashbaugh, Stark returned to Oregon and asked Mrs. Roles and taxpayer's wife whether they could influence their husbands to send him shingles under an arrangement whereby they would benefit financially and they told him they thought that could be arranged. (Ex. 129, pp. 14-15.) Stark then entered into the Ashbaugh Company arrangement with taxpayer's wife and Mrs. Roles. This agreement was signed by him as a representative of the Beverly Roofing Company as party of the first part and by taxpayer's wife and Mrs. Roles as parties of the second part. (Ex. 123.) Stark stated in his deposition that if there had not been an inability to secure shingles and if he had been able to deal directly with

the mill he would not have entered into any partnership and that the only way to get shingles at that time was through influence to make it worth the while of the mills to furnish the shingles. (Ex. 129, p. 34.) The following colloquy occurred in his deposition (Ex. 129, pp. 44-45):

> Q. Then the sole reason for taking in Mr. Roles' and Mr. Bronston's wives was to get shingles from the Warrenton Shingle Company?
> A. Right.
> Q. You knew you could get the shingles from the husbands through the wives and you knew you could not take the husbands into partnership, is that right?
> A. Right.
> Q. And if you could have taken the husbands into partnership there would have been no necessity to take the wives, correct?
> A. Right.
> Q. If you could have gotten the shingles without taking anybody into partnership you would have made about 65% more wouldn't you?
> A. Probably, yes.
> Q. In other words you were forced to form this partnership in order to get the shingles from Warrenton Shingle Company, correct?
> A. That is absolutely correct.

Stark admitted it would have been illegal to have entered into a partnership with taxpayer and Roles. (Ex. 129, p. 70.) It is clear from the record that the District Court was correct in finding that Ashbaugh was organized as a mere subterfuge to permit taxpayer and Roles to avoid OPA Regulations and that the wives were made nominal partners in the enterprise only because it was obviously illegal for the taxpayer and Roles to enter into the arrangement. (R. 141.)

It is difficult to see where any business purpose was served by including taxpayer's wife as a partner. She was made a partner so that she would influence her husband to send shingles to Beverly when it would have been illegal for her husband to be a partner and for the purpose of enabling taxpayer to get a higher price for shingles than was permitted under OPA Regulations. Such an arrangement does not manifest an intent in good faith and with a business purpose to join together as partners in the conduct of a business.

Under the terms of the Ashbaugh agreement the Beverly Roofing Company was to manage and operate the partnership and to furnish all of its capital. Taxpayer's wife and Mrs. Roles were to receive 65 per cent of the profits for 1945 and 1946 and 50 per cent of the profits thereafter. (Ex. 123.) Taxpayer's wife made no contribution of capital or services to Ashbaugh. (Ex. 129, p. 56.) She testified the only thing she did was to endorse the checks she received and that she did nothing in a business way for the firm at all. (R. 134.) Taxpayer testified that the checks his wife received were deposited in the joint bank account with him on which both could draw. (R. 86.) Mr. Stark testified (Ex. 129, p. 56):

> Q. What work did Mrs. Bronson do to your knowledge?
> A. She exerted her influence on her husband I suppose.
> Q. You suppose that's all she did?
> A. Yes. She was in Parkdale at the lumber mill there.

In taxpayer's brief (p. 48) it is stated that the Gov-

ernment is contending that the money received by taxpayer's wife was actually the income of the Warrenton Company. (Br. 48.) There is nothing in the record to indicate that such a contention has ever been made and it is, therefore, unnecessary to discuss the point raised as to whether or not a corporation may be a partner either under Oregon law or for federal income tax purposes.

The argument in taxpayer's brief is unsound that an individual may not be taxed on profits earned from property which he neither owns nor controls (Br. 47-50.) The courts have repeatedly held that it is the command of the taxpayer over the income which is the concern of the tax laws. If ownership or status is disguised the taxing authorities may look through the disguise to the realities. *Nordling v. Commissioner,* 166 F. 2d 703 (C. A. 9th), certiorari denied, 335 U.S. 817; *Yiannias v. Commissioner,* 180 F. 2d 115 (C. A. 8th); *Semmler v. Commissioner,* 173 F. 2d 218 (C. A. 6th); *Anderson v. Commissioner,* 164 F. 2d 870 (C. A. 7th), certiorari denied, 334 U. S. 819; *Epps v. Commissioner,* 164 F. 2d 482 (C. A. 6th); *Walker v. Commissioner,* decided June 28, 1946 (1946 P-H T. C. Memorandum Decisions, par. 46,159), affirmed, 160 F. 2d 313 (C. A. 3d).

The use of the name of taxpayer's wife in the Ashbaugh agreement which thus serves no business purpose should not be permitted to reduce the tax on income from the business operation where taxpayer furnished the consideration. The taxpayer was the real beneficiary of the arrangement and he, not his wife, had dominion

and control over the income allocated to her. She in no way contributed to the production of the income of Ashbaugh. The amounts paid to her were paid solely because the Warrenton Company owned and operated by taxpayer was willing to ship a substantial part of its output of shingles to the Beverly Roofing Company. (Ex. 129, p. 34.) The evidence clearly supports the District Court's finding that the money paid to taxpayer's wife by the Ashbaugh Company represented income of the taxpayer assigned by taxpayer to his wife and that such amounts were properly taxable to him. (R. 15.)

III.

The Findings of the District Court Are Supported by the Record and Must Be Affirmed.

The findings of the District Court with respect to both partnership arrangements are conclusive inasmuch as the record fully supports them. The taxpayer failed to show that these findings were clearly erroneous. In the absence of such a showing and where the findings are supported by competent probative evidence such findings cannot be set aside by this Court. Rule 52(a), Federal Rules of Civil Procedure. *Lerner Stores Corp v. Lerner,* 162 F. 2d 160 (C. A. 9th); *Lincoln Nat. Life Ins. Co. v. Mathisen,* 150 F. 2d 292 (C. A. 9th); *Wingate v. Bercut,* 146 F. 2d 725 (C. A. 9th).

CONCLUSION

The decision of the District Court was correct on both issues and should be affirmed.

Respectfully submitted,

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